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No. 93-1124

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

ARKANSAS PEACE CENTER, ET AL. *Petitioners,*

VS.

ARKANSAS DEPARTMENT OF POLLUTION CONTROL AND ECOLOGY, ET AL. *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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SUMMARY OF THE ARGUMENT

The Arkansas Department of Pollution Control & Ecology (ADPC&E) disputes the Petitioners' contention that the Eighth Circuit decision conflicts with decisions of other circuits. For this point, Petitioners rely almost exclusively on the Tenth Circuit's recent decision in *United States v. Colorado*, 990 F.2d 1565 (10th Cir. 1993) *cert. denied*, 114 S.Ct. 922 (Jan. 24, 1994). ADPC&E argues that the Petitioners misconstrue the holding in *United States v. Colorado* and that there is no conflict with the Eighth Circuit's decision.

Petitioners also claim that the Eighth Circuit erroneously decided an important federal question by ignoring factual findings by the trial court indicating a threat to the public health and environment. ADPC&E responds that the Eighth Circuit correctly concluded that the trial court's factual conclusions were predicated upon a clearly erroneous interpretation of applicable law.

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ARGUMENT

The Arkansas Department of Pollution Control & Ecology (ADPC&E) submits this brief response as a supplement to those filed by its co-respondents, the Environmental Protection Agency (EPA) and Vertac Site Contractors.

As noted at App. 9a, ADPC&E's formal control over the Vertac Incineration Project ended during the pendency of the appeal to the Eighth Circuit. Thus, the original request for injunctive relief against ADPC&E has been rendered moot. ADPC&E continues, however, to be intensely concerned about riddihg the City of Jacksonville, Arkansas of the threat posed by the Vertac hazardous wastes. For this reason, ADPC&E responds in opposition to the Petition For A Writ of Certiorari submitted by the Arkansas Peace Center (APC).

I. THERE IS NO CONFLICT AMONG THE CIRCUITS IN NEED OF RESOLUTION CONCERNING THE MEANING OF CERCLA SECTION 113(h)

APC bases the first point of its Petition on the contention that the decision of the Eighth Circuit in this case squarely conflicts with the recent decision of the Tenth Circuit in *United States v. Colorado*, 990 F.2d 1565 (10th Cir. 1993) *cert. denied*, 114 S.Ct. 922 (Jan. 24, 1994). To a large extent, APC hoped to parlay the prospects of this Court granting the federal government's Petition For a Writ of Certiorari in *United States v. Colorado* to their advantage, and cited the federal government's arguments for their Petition in that case as supporting APC's Petition here. *See* APC Petition at 17-18. This Court's recent denial of the Writ of Certiorari in *United States v. Colorado* renders a significant portion of APC's argument on this point moot.

As to whatever force remains of Point I of APC's Petition,

ADPC&E can offer a unique perspective. The State of Arkansas served as both a defendant/appellant in this case and filed as an *amicus* participant on behalf of the State of Colorado in *United States v. Colorado.* ADPC&E fully supports the Tenth Circuit's resolution of the important issue involved in *United States v. Colorado,* but is just as committed in its opposition to APC's unwarranted extension of that holding to hinder ADPC&E's and EPA's attempts to remedy the environmental threat posed by the Vertac site.

In determining whether a conflict between the circuits actually exists, the Court should examine the actual holdings and discern whether they can be harmonized. In the case of *United States v. Colorado,* the Tenth Circuit's holding is naturally restricted to the facts before it for resolution. The Tenth Circuit expressly stated the important issue posed for review:

> At issue is whether a state which has been authorized by the . . . EPA to "carry out" the state's hazardous waste program "in lieu of" RCRA . . . is precluded from doing so at a hazardous waste treatment, storage and disposal facility owned and operated by the federal government which the EPA has placed on the national priority list . . . and where a CERCLA response action is under way.

United States v. Colorado, supra at 1567. The Tenth Circuit held that the State of Colorado could indeed assert its state authority as authorized under RCRA to influence the closing of a surface impoundment at a federal facility even if the same waste management unit was also the subject of a CERCLA response action. This holding resolved long-standing tension between the EPA and RCRA-authorized States over the degree of residual state authority at a federal facility when remediation efforts had entered the ambit of CERCLA.

The only factual coincidences between *United States v.*

Colorado and the present case are that Arkansas is also a RCRA-authorized state and that Vertac is listed on the National Priority List. The distinctions, however, dispel APC's contentions that the Eighth Circuit's decision in this case conflicts with the Tenth Circuit's decision in *United States v. Colorado*. The present case does not involve a facility where the state seeks to invoke its RCRA-authorized state authority; both ADPC&E and EPA concur that the Vertac site entered the ambit of CERCLA when the previous operator abandoned both operations and RCRA corrective actions in early-1987. The present case does not involve a federal facility; before it discontinued operations, Vertac was a private enterprise engaged in the manufacture and formulation of herbicides and pesticides. And most significantly, the present case does not involve a dispute between state and federal officials; both ADPC&E and EPA have concurred on the appropriate response measures necessary to deal with the relentlessly corroding drums of hazardous waste present at the Vertac site.

Thus, ADPC&E can support the Tenth Circuit's decision in *United States v. Colorado* in anticipation of circumstances where ADPC&E's authority as a RCRA-authorized state may be plenary as a matter of law, yet cooperation from federal officials is not forthcoming. That is not the case here, however. As the party most directly affected by any invocation of *United States v. Colorado*, ADPC&E can comfortably live with both the Eighth Circuit's and the Tenth Circuit's holdings. On this practical basis, APC's suggestion that these holdings are hopelessly irreconcilable should be rejected.

APC also reads *United States v. Colorado* as posing a more expansive judicial definition of what constitutes a "challenge" to a CERCLA response action than was applied by the Eighth Circuit in the present case. The Tenth Circuit's decision was more narrowly crafted than APC contends. In *United States v. Colorado*, the Tenth Circuit noted that a state's efforts to enforce

its own hazardous waste laws at a federal facility where a CERCLA response action is in progress is not necessarily a challenge to the response action prohibited by CERCLA Section 113(h). Colorado was not seeking to halt the CERCLA response activities; rather, the State was seeking to assure, through the right of approval of a closure plan, that the cleanup of a surface impoundment was in accordance with state law.

In contrast, in this case APC sought to halt the CERCLA response action at the Vertac site conducted by both ADPC&E and EPA, and succeeded to the extent of getting the district court to issue a temporary restraining order and a preliminary injunction enjoining removal activities at the site. The Eighth Circuit, recognizing APC's actions as direct challenges to response actions prohibited by CERCLA Section 113(h), stayed each of these injunctive orders, and eventually ruled that the trial court lacked subject matter jurisdiction to even entertain APC's challenges to ADPC&E's and EPA's chosen response actions. In so holding, the Eighth Circuit aligned itself with the consensus of the circuits facing this issue, and held that a pre-implementation challenge to a CERCLA response action cannot be reviewed by the federal courts pursuant to Section 113(h) of CERCLA.

For these reasons, APC's suggestion that a conflict exists among the circuit courts should not be credited, and the Petition should not be granted on this ground.

II. IMPORTANT QUESTIONS OF FEDERAL LAW WERE NOT ERRONEOUSLY DECIDED BELOW

ADPC&E's co-respondents will directly address the discrete challenges to the Eighth Circuit decision raised in APC's Petition. ADPC&E's response here is restricted to the important question of federal law actually litigated at length below, but not raised as a point of error by APC.

Aside from the jurisdictional issues, the central issue of this

dispute below revolved around how the operational efficiency of an incinerator burning dioxin contaminated waste should be demonstrated. The trial court erroneously concluded that 40 C.F.R. 264.243(a)(2) required a demonstration of 99.9999% Destruction and Removal Efficiency (DRE) on dioxin itself rather than on a harder to burn surrogate. From this flawed premise, the trial court presumed irreparable harm and a probability that APC would succeed on the merits. *See* App. 29a.

The DRE issue was briefed extensively to the Eighth Circuit, which addressed the issue even though it did not have to. The Circuit Court noted that 40 C.F.R. 264.243(a)(1) on its face did not require a DRE demonstration on dioxin itself, a fact even conceded by the trial court (App. 14a). To counter the trial court's assumption about the purpose of the regulation, the Circuit Court cited EPA's contemporaneous explanation of the regulation which stated that demonstrating DRE on dioxin would be difficult, if not impossible (App. 15a). Given the unambiguous language of the regulation, and the fact that respondents' implementation of the DRE requirement was consistent with the rationale stated for the regulation when it was promulgated, the Eighth Circuit concluded that the trial court's reading of 40 C.F.R. 264.243(a)(2) was incorrect as a matter of law (App. 14a). In fact, the Eighth Circuit went so far as stating that the trial court's erroneous application of the DRE regulation provided independent grounds for dismissal of the APC challenge to the Vertac response action (App. 15a).

It is notable but not surprising that APC does not raise the Eighth Circuit's construction of the DRE regulation as a ground for review by this Court; on its face, the regulation is clear and does not admit much room for competing interpretations. In considering the alarming implications evoked in its Petition, however, this Court should recognize that the trial court's factual findings touted by APC (*See* Petition at 26) were inextricably tied to an erroneous application of the law. The Eighth Circuit did not

ignore direct evidence of threats to the public health in favor of a legal technicality; instead, it correctly discounted the trial court's factual conclusions because they were predicated upon a clearly incorrect conclusion of law.

For this reason, APC's contention that an important federal question was erroneously decided below should be rejected.

CONCLUSION

For the reasons stated herein and by its co-respondents, ADPC&E respectfully requests that APC's Petition For A Writ of Certiorari be denied.

Respectfully submitted,

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